Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 23-CV-14297-AMC

SALLY ARGONA, et al.,

Plaintiffs,

vs.

SELENE FINANCE, LP,

Defendant.

Ft. Pierce, Florida

August 14, 2024

Pages 1 to 66

MOTION HEARING VIA TELECONFERENCE
BEFORE THE HONORABLE RYON M. McCABE
UNITED STATES MAGISTRATE JUDGE
(TRANSCRIPT OF DIGITAL AUDIO RECORDING)

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(PROCEEDINGS TRANSCRIBED FROM DIGITAL AUDIO RECORDING.)

THE COURT: I am calling the case of Cruz versus Selene Finance, 23-CV-14297.

Let me have appearances, starting with the plaintiff, please.

MR. MAGINNIS: Good afternoon, Your Honor, Edward Maginnis for the plaintiff, along with my co-counsel, Scott Harris and Katherine Ann Robinson.

THE COURT: All right. Defense.

MS. ACCARDI: Good afternoon, Your Honor, Sara Accardi on behalf of the defendant Selene Finance, and I've also got my client here on the Zoom, Christopher Bass.

THE COURT: All right. Scott Harris, you are -- who is the other one there, Katherine?

MR. HARRIS: She is an associate with our firm, Your Honor.

THE COURT: Okay. Excellent.

So, we are here on two motions. We have a motion to dismiss, and there is also a motion to strike a demand for jury trial.

Defense, I'll turn it over to you, but I have a few questions first. I'm going to let everyone make all the arguments they want to make, but I do have some questions. So I want to start with those, and I will sort of bounce the questions back and forth between you.

I guess this is first a question for the plaintiff.

I have searched the record and every version of the default letter that I find claims to be page one of three, and yet, I never find a page two or a page three.

Am I correct about that?

MR. MAGINNIS: I would have to look, Judge, and see if we've improperly not included an entire document. I can tell you that page two does have text which is relevant.

Page three is just the end of a disclaimer, but we could get that to the Court immediately if the Court is not able to see a version of the letter that has all three pages, and specifically page two, because page two does have some text which is at issue.

THE COURT: Yeah. I am going to ask -- I am going to instruct my law clerk who's on the line right now go back -- it should be attached to the amended complaint. Right?

MR. MAGINNIS: It should be, yeah.

THE COURT: Go to the amended complaint, Izzie, and look again.

THE CLERK: I'm here right now. I mean, I'm looking at is it right now, DE 15. There is Exhibit A. Exhibit A is -- like the text of Exhibit A is page one of two. Page two of two is just the first page of the notice of the letter, and it goes straight to Exhibit B, and that's the same thing, so there is no page two or page three.

MR. MAGINNIS: What would be the best way to get that to you, Judge?

We could e-mail you a copy of the letter right now.

THE COURT: Well, let me ask the defense.

Defense, did you also put it in? I thought you may have attached the letters in something in some of the papers you submitted to me.

MS. ACCARDI: I, did Your Honor, yes. They are exhibits to, I believe our motion to dismiss, and we only also attached the first page since that was all that the plaintiff had attached to their complaint.

I didn't want to bring in something that is external since it's a motion --

THE COURT: All right. Which is an issue, because I am bound by what's on the complaint, unless the defense agrees that I can look at it.

Defense, do you agree?

Do you consent to that?

I'm not going to look at anything that's not within the four corners of the complaint, quite frankly. Although, in fairness, you did give me the mortgage notes, which were not attached to the complaint either.

MS. ACCARDI: That's true, Your Honor. I think an exception for that is that those are also publicly available. They were available because they were recorded in the official

records. I think those could be judicially noticed. The default notices could not, and I don't think we would consent to anything that wasn't attached and incorporated on the complaint.

I know Mr. Maginnis had mentioned additional language on page two. I don't know of any that was referenced in the complaint, so if there is additional language that he wants to base his claims off of, I think then we would need to, you know, include the full document.

THE COURT: Not that I'm going to allow it but, Mr. Maginnis, what is the language?

What's the gist of the language that's on page two?

MR. MAGINNIS: It's not dissimilar -- ultimately, Judge, I see where you're coming from, and we're not asking to convert this outside of the pleadings, but there is three similar contentions that we contend violate the statute and the one that's on the second page, which may not be in front of the Court, is a phrase that says, "If you send an amount less than the full amount due, Selene can apply the amount received to your account and proceed with the applicable foreclosure proceedings without further notice to you."

We believe that's false in the same way that some of the phrases on page one are false and for the same reasons. So, ultimately -- obviously, we would prefer to have the Court relying on a full document, but ultimately, if what we have is

page one, it has the same similar statements that we contend to be false based upon the restrictions from RESPA.

THE COURT: Okay.

I don't know that that additional language you are sort of proffering to me is really immaterial to the way I'm thinking about the case, but as we proceed through this argument, if I think it is, I will alert you and then you can -- well, I don't know what you'll have to do about that, quite frankly, because it's not on the record right now.

All right. My next question is this; as I read the case law -- and I will give this question first to the defendant, and then I will let the plaintiff have a response.

As I read the case law, the issue of whether or not this letter -- whether or not the letter constitutes a threat and whether or not it's false or misleading are both jury issues, and my job would be to determine, whether based upon the allegations on the complaint, could a reasonable jury who has been -- who has been instructed to use the least sophisticated consumer standard, would such a reasonable juror with that instruction in front of him or her, would they be able to find this to be a threat or would they be able to find it to be false or misleading.

Do you disagree that that's sort of the analysis that I should be making?

MS. ACCARDI: I don't think so, Your Honor. I do think

it is -- ultimately, it would be a fact question. I think it's still a fact question that could be resolved, honestly, on a motion to dismiss and has been by the Southern District in the Wise case, obviously, and actually, also by the Eleventh Circuit in Madura.

So, it's not something that is prohibitive of determination on a motion to dismiss, Your Honor.

THE COURT: Okay. Plaintiff, do you take a different view?

MR. MAGINNIS: Judge, yeah. We agree with your position. Ultimately, we think it is a question of fact for the jury or perhaps summary judgment. We believe that it's plainly a threat, plainly misleading, but certainly not something that could be resolved against us on a motion to dismiss taking our allegations as true.

The Wise case is an example that counsel has used in their brief, and I think what the theory of the Wise case is ultimately -- it's almost a truism. They say that the communication is a truism because they say, well, we haven't recorded the judgment, but we could at any moment. All of the conditions of precedent have been met and so the letter is not technically false because you could record a judgment at any moment.

Whereas, we contend not only does Selene not act according to the letter, they can't. They haven't met any of

the conditions precedent associated with doing the things that they contend they do in the letter.

So, it's certainly not something that we think is a motion to dismiss question. The question for us is can we ultimately show the Court at a summary judgment standard that on a liability basis it's plainly a threat, but if the Court is inclined to think it's a jury question, we certainly wouldn't disagree with that.

THE COURT: All right. Let me move to my next question, and then, again, I'm going to give you all a chance to say whatever you want to say.

As I understand one of the defense arguments, the defense argument essentially is, we are required by TILA to send out a notice at the 45-day mark, doing, among other things, warning the homeowner of the possible risks, and one of those is foreclosure.

So, they are under a statutory obligation to send out this letter of warning that a foreclosure may result if they don't cure this thing. They're also obligated by their note and mortgage documents to send this to establish a cure date and that they've done it. That's what this letter does.

This letter is in compliance with their mortgage document and with TILA, which requires them to send the letter warning of the possible risks. And I understand your argument as to why it's false, but my question to you, plaintiff, is

what would you have them say?

How could they have written this letter and comply with what they are supposed to do?

MR. MAGINNIS: Well, yeah, and the case that was cited by both parties in this was -- Ms. Accardi certainly knows about it more than I do. It's her case, and ultimately, the Court found that you can have a TILA disclosure, you can follow the rules of TILA and still violate the FDCPA if it's also an effort to collect debt and you make a misrepresentation. I think in that case it was the amount.

So, our problem is not with sending a letter, and our problem is not with the usage of the plain text of the mortgage documents or what TILA would have them do. And what the mortgage document says is you've got to give them a deadline and it's got to be not less than 30 days.

So, the problem with the letter is they could fix it by moving that deadline to something greater than 30 days that puts them on the line with Fannie Mae's obligations.

There is additional language in there that we contend -- talking about the reality of the situation. We have no problem with notifying customers of the potential for acceleration of the foreclosure if they continue to default, but that's not what it says. It says, you have to pay this by this date or else -- essentially, your head is on the guillotine and you're at our mercy for acceleration of

foreclosure, and we have the ability to do that.

And the fact is that borrowers have far greater protections than that based upon federal law.

So, they could include the text from the mortgage and use a language that's consistent with 120 days if they actually accelerate and foreclose, or they can use additional text to make the letter true.

THE COURT: By the way, you agree that, obviously, accelerating and foreclosing are two different things, and although the Regulation X, I guess, prohibits them from starting a foreclosure until 121 days, but it doesn't prohibit them from accelerating. Right?

MR. MAGINNIS: Well, in Florida law -- typically, acceleration under Florida law comes with the foreclosure, and I know we're here on a motion to dismiss and not on the evidence, but ultimately that's what we really anticipate the evidence is going to show, given how far along we are on the case.

Yeah, we've plead that Selene does not accelerate in line with the letter, that they do it in context with the filing of a foreclosure lawsuit. So, actually acceleration takes place after foreclosure in Florida.

The referral of foreclosure comes at 120, and the acceleration comes when they file a lawsuit, but they are two different things.

THE COURT: All right. Defense, I will give you a chance to respond to what he said, if you want to.

MS. ACCARDI: Sure, Your Honor, I think the distinction here is a couple of things. The immediacy, I think, is the number one important distinction there, is that plaintiffs read into the language which is literally, at least from what is attached to the complaint now, a single line, that says, "We may accelerate if payment is not due," and they read into it this immediacy that we will accelerate the next day.

And that is nowhere present in any of the notices that are at issue. There is no deadline prescribed as to when we will take that step. Nor is -- I mean, considering the language made, nor is even that Selene will take any action at all, right, definitely equivocal language there.

So, I would think, to comply with the plaintiffs' reading of this, in the 120 days, you know, assuming again since we have to, since that's what's plead in the complaint that Selene, you know, doesn't move forward with acceleration until 120 days, assuming that is correct, then we would have to include in this notice something to the effect of, you know, your deadline is at the 120-day mark, and then we will immediately accelerate and foreclose the very next day, you know, which is just not practical under the circumstances, and is not required under the mortgage and would create a whole other host of other issues, I think, Your Honor.

And you had mentioned and teed up my first argument that I would make, really, is that based on TILA and the expressed terms of the mortgage, these letters do comply with what is required of Selene. And plaintiffs' interpretation would place a whole load of additional burdens and expectations on something that is just not required by either federal law or the terms in the mortgage.

THE COURT: Some of the case law in some of the default letters referenced in cases that I've read, which is one of the reasons I was interested in what's on the other pages of this letter, there is sort of a catchall provision that says, but we will not foreclose you in violation of the contract terms or the law, something like that.

And a lot of courts have relied upon that, but this letter doesn't seem to have that.

And is that an issue for you, to the defense?

Does that -- in other words, does that distinguish this letter from the letters in those other cases?

MS. ACCARDI: I think there is a few distinguishable points, and I do think, to Your Honor's credit, the entire letter needs to be read in conjunction with each other, right. It's not just singular terms. There is a provision, I believe, on the second page, saying something to the fact that we will pursue, you know, options available to us pursuant to the law, basically, and to the terms of the security agreement.

I don't think it's exactly on point or identical to the language you're referencing, but there is a reference to that. And I think the distinguishing factor from a lot of these cases, Your Honor, is the language that is cited, right, the threat, the purported threat. And, again, going back to this immediacy argument is that you have to kind of compare the two letters and say -- I know a lot of the line of case law that the plaintiffs rely on heavily is the Seterus line of questions that Mr. Maginnis' firm was involved in, and those letters particularly have much more immediacy elements in them.

They literally make the statement that if, you know, the default is not cured, we intend and will accelerate, and we -- I can quote the exact language to Your Honor, but it says, you know, immediate is in that language.

That is one of the most distinguishing factors, honestly, is this immediacy key, and the fact that that immediacy language is included in a lot of these default notices and it is expressly not included in Selene's.

THE COURT: All right. Those are my questions.

So, defense, we will start with you.

What else do you want to tell me?

MS. ACCARDI: Sure, Your Honor.

So, you kind of really hit on my first argument which is going to be the default notice is complying with the mortgage terms and TILA, so I will kind of skip that one since

it seems like have you a fairly good understanding of that.

I will go straight to kind of the heart of the argument, which is the FDCPA claims and whether they constitute a threat, and if so, a threat that cannot be taken, basically, a legally impermissible threat.

So, the case law on that -- I had previously mentioned the Wise case, Your Honor. I think that one is particularly instructive, where it basically said that a warning that a servicer could have a sheriff sell a debtor's property in order to pay off the judgment was a reality-based reminder and not a threat to take action that it could not take.

I think similarly here, Your Honor, again, at this point I think we've narrowed things at least based on the current allegations of the complaint to a single line in the default notice that states failure to clear the default on or before the date specified may result in acceleration.

That is what we're talking about.

So, to me, reading that is very akin to the Wise case were it's just providing you a reminder of what is going to occur. Right?

It "may" occur, not even will occur, shall occur, we intend to take this action immediately, none of that language is present.

THE COURT: I think one of the things I have to consider is would an unsophisticated person who reads that

believe that on the day following the expiration date they could get a foreclosure suit filed against them, and you take the position that even an unsophisticated person who reads that would not come to that conclusion?

MS. ACCARDI: I would, Your Honor. I think -- to that conclusion, it's -- you have to give meaning to the words there included, and I think under the least sophisticated consumer standard, even -- I think it's the -- I think it's the Clomon case out of the Second Circuit states that, "The least sophisticated consumer is presumed to have a rudimentary amount of information about the world, and a willingness to read a collection notice with some care."

I think that's what it comes down to, is they have to read it with some care. Some care, if you read it, even just that one singular line, it's going to say, we may take this action, or we may not. I think both of those are equally available, and understanding terms, it doesn't state a present intention to do anything is really the key thing there, Your Honor.

THE COURT: Okay. Thank you.

MS. ACCARDI: Sure.

Then I also wanted, and I think I also previously mentioned, the Madura case. That is an Eleventh Circuit case, and in that one the Court held that indicating a matter may be referred to an attorney if payment is not made is not a

deceptive practice.

And I think that one is -- well, I know the Eleventh Circuit hasn't, obviously, ruled on this specific issue. That is pretty close in the fact of the unequivocal or the distinction between equivocal and unequivocal language, right, that may refer to an attorney was not actionable under the FDCPA.

Additionally, I think that kind of probably covers my argument with regards to whether there was a threat made.

I will say the default notices, like I said, simply state an intention that, you know, acceleration may result, which is very -- will result, honestly, if the default was not resolved within the time period allowed for, that would happen. That's, obviously -- you know, unfortunately, Selene does foreclose on borrowers to the extent that they don't bring their loans current. That is legally permissible, you know, under the terms of the mortgage, a step that Selene can take if certain conditions, obviously, are not met by the borrower.

I think that would cover that, Your Honor.

I would move to the false representation. So, really, under the FDCPA this would be 1692(e)(10), excuse me, and that, again, I think -- the plaintiffs, I think, rely on a host of cases, none of which are really in the persuasive authority, none of which are in Florida.

Most of them are, it looks like, Seventh District,

Seventh Circuit and Ninth Circuit, going to whether the threats, purported threats included are legally cognizable, so whether Selene could actually accelerate these loans.

And most of the case law I think relied upon by the plaintiffs state the opposite. Really, it's -- a lot of these cases -- the Ruth case out of the Seventh Circuit threatened to share plaintiffs' information when the creditor was barred from doing so pursuant to statute.

So, objectively, the creditor could not take the action that they were purportedly threatening to take.

The same thing in the Gonzalez case, Your Honor, and in that the Ninth Circuit threatened to report on a debtor's credit when it was legally barred from doing so, and then the Haddad case out of the Northern District of Illinois threatened to continue to incur charges when charges were not legally permissible to be added to the account under the contract terms.

So, I think that that portion of it, and in terms of the false representation, paragraph 22 of the mortgage specifically provides that if the default is not cured on or before the date specified in the notice, a lender, at its option, may require immediate payment and all in full of all sums secured by the security instrument and may foreclose.

And then Section 6C of the note states that, "The note holder may send written notice, and if the borrower does not

pay the overdue amount by a certain date, the note holder may require the borrower to pay immediately the full amount of principal which has not been paid, plus interest."

So, pursuant to the terms of the mortgage, Selene does have the legal authority to accelerate on loans once they go into default.

Then I will skooch on, Your Honor, to Section 1692f of the FDCPA, that's kind of the catchall provision. That's another cite, I believe the third count of the complaint.

Pursuant to that provision, Your Honor, "A debt collector's act in collecting a debt may be unfair if it causes injury to the consumers that is substantial, not outweighed by countervailing benefits to consumers, and not reasonably avoidable by the consumer."

A few things to unpack there, Your Honor.

I think if it causes -- so, that -- excuse me, I didn't quote. That's the Bryant case out of the Southern District, Your Honor.

First thing I think would be causes injury to the consumer. That will be brought up and I will talk about that more when we discuss the negligent misrepresentation claim, Your Honor, but there is really no actual damages here that are alleged that are recoverable, so I think that portion of the injury portion would be lacking here.

Again, with the substantial in terms of proving this

claim, it has to be a substantial injury. I mean, I think that -- it's alleged in the complaint all these debtors that are at issue allege -- they admit that they were in debt, excuse me in default of their loan obligations, and they don't deny that they owe this money. So, I think, whether they actually paid as a result of the default notice or did not, I don't know how you're claiming a substantial injury when they were otherwise legally obligated to pay sums.

And there have been no allegation that any of the default notices have inaccurate amounts or charges or anything to that effect.

THE COURT: I didn't catch that before, so you're saying 1692f has as an element that there has to be an injury?

MS. ACCARDI: That's -- per the Bryant court out of the Southern District, yes, Your Honor, the Court held that a debt collector's act in collecting a debt may be unfair if it causes injury to the consumer that is substantial, not outweighed by countervailing benefits and not reasonably avoidable by the borrower.

THE COURT: All right. Bryant, I will go look at that case.

MS. ACCARDI: Sure.

I can give you the citation if that's easier, Your Honor.

THE COURT: Do you have it?

MS. ACCARDI: I do, yes. It's 2017 WL 2955532.

THE COURT: Okay. Great, thank you.

MS. ACCARDI: And I think wrapping that one up, the third element, not reasonably avoidable by the consumer, obviously, in this situation, had the borrowers remained current on their loan obligations a default notice would have never been sent to them.

Then the second portion of the analysis of the 1692f claim would be whether the conduct that is alleged with regards to the 1692e claim is separate and apart from the conduct that is alleged with regard to the 1692f claim.

The Miljkovic -- I probably messed that up, sorry, Your Honor -- out of the Middle District -- I will give you the citation since I can't say that name.

THE COURT: That's fine. I have that one already.

MS. ACCARDI: Thank you. I probably got it very wrong.

The Middle District stated there that a complaint will be deemed deficient under 1692f if it does not identify any misconduct beyond which the plaintiffs assert violate other provisions of the FDCPA.

The default notices form the basis for all of the plaintiffs' claim under the FDCPA here, and, so, for that reason, I think the 1692f claim would fail since it doesn't allege this separate conduct.

That same court, Your Honor, held that in order to

proceed under the 1692f, the appellant is required to allege facts shown that the least sophisticated consumer would or could view the subject conduct as partial and unjust or as unscrupulous and unethical. So, these additional allegations would need to be present, and additional facts supporting them would also need to be present.

THE COURT: Can you give me an example of -- what type of practice would qualify as a subsection F practice that would not also be a subsection E practice?

MS. ACCARDI: I think, Your Honor, it would have to be -- so, unscrupulous or unethical I think that that could be one where -- if you -- I have seen some of these cases where people would get on the phone and tell them you need to contact your family to pay this debt off, if you don't do that then we're going to immediately foreclose on your home when they have no right to foreclose on their home, so I think the conduct is obviously ratcheted up a bit is what I've seen.

THE COURT: I just want to understand conceptually how the statute works.

So take that example, someone writes a -- a bill collector writes a letter saying we are going to foreclose on your home. They have no right to foreclose on your home. Obviously, that's an E claim.

MS. ACCARDI: Correct.

THE COURT: And then the plaintiff pleads it as an F

claim as well and says it's an unfair, unethical practice. You say the F claim has to be dismissed because it's already plead as an E claim.

MS. ACCARDI: Well, I mean, I think regardless it would be duplicative, right. So they couldn't recover under both, and I think it would be that additional conduct of what was the manner in which that statement was made, you know, did he call friends and family when he did it, you know, things of that nature that would draw it out of just the E category and kind of make it a separate -- not only was it potentially a false threat, but the manner in which it was provided was unethical or unscrupulous.

THE COURT: Okay.

MS. ACCARDI: I now move on to the FCCPA claim, Your Honor.

For that one, under the section alleged, which is 15 -- excuse me, 55972, subsection 7, "Courts will consider whether a practice is abusive or harassing as they consider the frequency of the contract, the legitimacy of the claim, the creditor's claim, the plausibility of the debtor's excuse, and the sensitivity or abrasiveness of the personalities.

That's the Brown case out of the Middle District tells that.

The Middle District in Savage found that that the plaintiffs failed to state a claim under 559.7227, where the

subject letter stated foreclosure proceedings would not be commenced until allowed by applicable law.

So, I think that would be a key distinction that is not quite before the Court I guess at this point, Your Honor, but something that could come into play. And I think also for the reasons that we've already discussed regarding the FDCPA, as I'm sure Your Honor knows, they go hand in hand, so I think the FCCPA claim would also fail for -- the separate reason, really, is that the claims alleged are not abusive or harassing because they don't fall within the parameters that are really set forth under the FCCPA claim.

There is no claim that, you know, we sent, you know, 20 million letters to the borrowers or anything to that effect, or claim, you know, that the debt amounts included in the letters was illegitimate or not founded or things of that nature.

THE COURT: Okay.

MS. ACCARDI: Lastly, the negligent misrepresentation claim, Your Honor, I will go straight to the point for that one.

Critical and actual injury is an element of negligent misrepresentation. The Saltero case out of the Southern District held that if no harm is shown, an action for negligent misrepresentation fails on the merits.

In this case, Your Honor, plaintiffs failed to

demonstrate that they suffered an actual injury due to the alleged misrepresentations. They just really boldly assert that they suffered some financial damage and injury or that they had an informational injury. However, the Court in Barilla held that the plaintiffs were alleged that they were injured by satisfying their contractual obligations.

The Court is aware of no case law to support that contractually owed payments are actionable losses within the meeting of Florida negligent misrepresentations law.

THE COURT: What are the damages available under the statute, by the way?

When someone wins one of these, under the FDCPA, what do they get?

MS. ACCARDI: I think it depends on the avenue. In this case, Your Honor, from my understanding, statutory damages is one availability, and then actual damages would be kind of depending on the violation, Your Honor. So, if they paid amounts that were not due and owing, so in the situation that they are claiming that the default notice had the wrong amount and they claim -- and they paid that amount and then they could have had interest on that amount kind of thing, that, I think, would be an actual loss that would be cognizable under the statute.

Pain and suffering to a certain extent is available, obviously difficult to prove I think, Your Honor.

And I think that that would be kind of the main ones.

Here, again, it's mainly just -- plaintiffs have described their injuries as informational injury, that they might have taken different actions had they had more information, not that they even really definitively took any action on the default notices at all.

THE COURT: Okay.

Do you know, does Florida law allow nominal damages for a negligent misrepresentation case?

MS. ACCARDI: Not to my understanding.

No, Your Honor, I think based on my understanding of the Soltero case, that's a Southern District case but, again, you have to have harm shown, and I think -- yeah, the Williams case out of the Northern District of Alabama says, "In the absence of an actual injury resulting from the debtor's reliance on the, you know, on the misrepresentations, they cannot establish a prima facie case for negligent misrepresentation."

So, I think you would have -- not all damages would be sufficient. You would have to prove some amount of actual injury, whether it's nominal amount, you know, mailing, if sometimes if you had to send in mailing notices, things like that. You could recover postage, things of that nature, but you would still have to prove that.

THE COURT: Okay. All right. Is that it?

MS. ACCARDI: That's it, Your Honor.

THE COURT: All right. Mr. Maginnis.

MR. MAGINNIS: Thank you, Judge. I will try to mirror Ms. Accardi's arguments for ease of the Court.

First, starting with what she wrapped up in response to some of your questions, the immediacy piece in the cases involving "may." The "may" cases -- there are two issues for the Court to be aware of. One, we have the LeBlanc case in the Eleventh Circuit where the Eleventh Circuit found in a letter that said, if you don't pay -- and I'm paraphrasing, of course -- you may refer this to an attorney to consider whether the attorney would want it.

The Eleventh Circuit found exactly what the Court was alluding to in the beginning, which is, the least sophisticated consumer might view that as a threat that they're actually going to file the suit, but it's not just that. That's one aspect of the matter.

With "may," and Ms. Accardi said it, what may has to mean is, we may or may not, and both of those imply that you can. You can, you just may or you may not. You can be benevolent or you can make a business decision to do it or not do it, and our whole point is that they can't and they don't.

And we believe that the evidence -- we plead that they can't and they don't, and we know the evidence is going to show that they can't and they don't.

So, "may" is just as harmful in that because what it does is that it has the borrower think, okay, I'm right on the edge of the cliff. If I don't meet this deadline, I will have to either come up with this money that I'm struggling to have or I'm going to have to reach out to them and do some sort of loan mod, and the negotiation is really strongly in their favor at this point, when the reality is they are not at the edge of the cliff. They have time. They can tread water and remain 30 to 60 days behind forever.

They can get their act together and get caught up, and they have months to do that because federal law protects them, and Ms. Accardi was very careful to say, "under the terms of the mortgage we can do this," and that's because under federal law they can't. And they know that.

THE COURT: Because they have to wait for the 120 days. Is that your point?

MR. MAGINNIS: Correct. Correct, on a federally backed mortgage, RESPA says you cannot refer the matter for foreclosure until you are 120 days past due, which means, mortgage is due on January 1st. February 1st -- they send the letter out February 15th. If you make any payment to cover January, you are no longer January past due, now you are starting from February, and you have to be four months straight in arrears before they can refer it to an attorney for foreclosure. So, this "under the terms of the mortgage" is

false and that's the whole point. They want to state it's the reality of the situation, but it's not.

The Moore case is another one that goes into it with that disclaimer, and, again, we would be fine with the whole letter coming in, Judge, because it doesn't have that disclaimer in it. The Moore -- and, certainly, what's in front of the Court doesn't have that disclaimer.

The Moore case, it's Eleventh Circuit, and so, we -- I don't think it's a correct decision. Basically, what it found was the borrower -- if you put in an as allowed by law, the borrower should have an understanding of what the laws regarding foreclosure are such that they could understand pieces of the letter, which certainly doesn't sound like the least sophisticated consumer to me, but it is the Eleventh Circuit law but it doesn't apply here. There is no disclaimer --

THE COURT: The only reason it doesn't apply is because this letter doesn't have that extra language.

Right?

MR. MAGINNIS: As to the foreclosure piece, and what the Barilla court found in the Seterus case, which obviously Seterus has that language, is they said, well, that disclaimer doesn't apply to acceleration either, so it doesn't apply for two reasons.

THE COURT: By the way, while we are on that point, she

gave me the mortgage documents, which are not attached to your complaint. I can consider them as long as you don't dispute their authenticity.

Do you dispute the authenticity of the documents she attached to her motion to dismiss?

MR. MAGINNIS: I don't know of any basis to dispute it. As far as I know, they were pulled from the public records, and counsel is right that they are publicly available, and these are uniform instruments.

THE COURT: All right. I appreciate the candor.

Keep going.

MR. MAGINNIS: Yeah, that would be -- winning that way would not be the way to win because I would just lose next week. So, no, we are happy for the Court to consider it.

So that's the crux of it, right, it's that the statements are misrepresentations regarding their rights. Specifically, just reading from the letter, and I will only stick to the first page, failure to cure the default -- "failure to cure the default on or before the date specified may result in acceleration of the sum secured, sale of the property, and/or foreclosure."

That statement could be true if the date specified they used was an accurate description of their rights. They needed to change the date specified for that to be true, because the date that they used, one that leaves you 80 days past due, if

you pay nothing would not result in acceleration, would not result in sale, would not result in foreclosure, any of those three.

And moreover, if you make a payment during that time period, you're not 80 days past due, you're back to 30 or 60. So the statement that you must pay all the amounts due under the terms of your note and security instrument by this date, that you must cure your default by this date, or else it "may" result in acceleration of the sum secured in the sale of the property and foreclosure, it may not. They cannot do that.

So, you know, that's -- on the same page, again, and it continues, "If you are not cured within 35 days of this notice, Selene, at its option may require immediate payment in full of all sums secured by your security instrument --" a/k/a accelerating, "-- without further demand or notice, and foreclose the security instrument.

That's not true based upon the deadline that they provide. So, that's the crux of the claim.

1692e(5), "Actions that cannot legally be taken are false representations."

We think if the allegations -- if we prove the allegations that are in our complaint, plainly, they are doing things that cannot legally be taken and they are making false representations regarding their rights. The's the e(10).

The F claim, I'm not -- well, nowadays you have to

prove a harm, anyway, because you got to have standing on behalf of the individual plaintiffs, but I am not aware of any sort of implicit additional requirement associated with 1692f.

I think the Court hit the nail on the head on what 1692f typically is, is it's a catchall, such that if you have a technical problem with your E claim but you have unfair and unconscionable activity such that eventually, if you your E claim is unsuccessful you have to resort to the F claim, that's typically how it plays out. And that's why it would be inappropriate to dismiss the F claim at a motion to dismiss stage.

It may well be that ultimately the F claim is redundant because the E claim moves forward, or it may be, Selene, of course, can defend the case, and there is case law that says, if you lose on the E claim and you don't have anything in addition to that that would support your F claim, well, then you lose the F claim. That's the motion to dismiss.

But what the Court did in Barilla, is they said, that doesn't mean the contrary, which is that the F claim is automatically superfluous at the motion to dismiss, because guess what happens, the F claim loses and then if they find a technical gotcha on E claim, then you don't have the F claim as the backup. So it may be that down the line this is only litigated based on these misrepresentations, these false misrepresentations, but the catchall is there for a reason.

The Miljkovic case that was referenced -- I'm sure I butchered the name too -- the Court rejected that in the Barilla case for exactly that reason. They said, it does not mean that what it is is that if you have any F claim that relies on the same facts of the E claim the F claim loses. But, the contrary, if your E claim loses, then your F claim doesn't survive, if the facts are the same.

And we agree, our basis that it's unfair and unconscionable is because they misrepresent their rights.

THE COURT: Can you give me an example of what would a true F claim be that's really different than an E claim?

MR. MAGINNIS: Like I said, I think it's if you find a technical deficiency. So, say you're pursuing a false misrepresentation claim and they establish that in some universe it could be perceived as technically true, but it's still unfair and unconscionable and induces borrowers to do things that they would never do if they fully understood it, that could be a claim where the representation is not false but it's still claimed fair.

It's like in the state the FDUTPA claims are and the other state law claims where you have an unfair and deceptive trade practice, something can be deceptive but even if it's not deceptive it can be unfair.

I can't think of a specific case off the top of my head or fact pattern because usually it's a catchall but that's the

situation is if you have some law in your E argument but you have bad behavior.

THE COURT: Okay.

MR. MAGINNIS: The Florida claim -- as counsel noted, a lot of this is because they stand on top of each other and so they believe that if the FDCPA claim survived the FCCPA claim survives. In the Savage case, which is also a Seterus case, the Court did dismiss the Florida claim but, again, based upon that disclaimer that was from that Moore case.

It's important to think about that under 559.727 where it's abuse and harassment, abuse and harassment includes telephone -- it's the situation where you're calling on the phone 20 times a day. That's inclusive, but that's not all abuse and harassment covers under that statute. It's a little bit broader than you might think of it using the term in everyday conversation.

For example, Weaver versus Wells Fargo, which is in our brief, they violated 559.727 when they contacted plaintiff about a mortgage debt that the plaintiff had no obligation to pay. We think that's very similar.

The Gaalswyk case that we also cite in our brief, allegations met 559.727, where a debt collection notice says misstatements statutory obligations of the debt collector.

So, I think the difference between the Florida claim and the FDCPA claim is if we got to a jury on the FDCPA claim,

they'd have -- if it's an FDCPA claim, if they did it's (indiscernible) liability.

In the Florida claim, they'd have to find that they did it and that it constituted harassment, whatever was proved to have happened.

But they largely overlap each other so my arguments are largely the same. They're misrepresenting what their rights are to the detriment of consumers.

Negligent misrepresentation, I think the Court hit the nail on the head regarding potential nominal damages. This comes up all the time. Injury and harm are not the same as damages. That's why you have nominal damages.

So, we believe we have properly plead that there are harms, and it's not a situation where, well, you owe the money anyway so you can't be harmed by misrepresentations because you have the time value of money. Again, these borrowers, if they had been properly informed as to what their rights are, had an opportunity to make optimal decisions regarding their finances instead of optimal decisions regarding their finances.

And we believe we will prove and have plead that these individuals were harmed in the sense that they relied upon the information there and they made decisions to their detriment. Emotional distress is also a potential viable claim under that as well, and if ultimately it was determined that they were harmed, but we didn't put a dollar value on it, then you're

right, it (indiscernible).

I'm not aware of any case law that went that far. Ultimately, this case is largely going to be about the statutory damages because we plead it as a class action, and individualized damages make it very difficult to do a class action.

But we do think the claim is viable, well plead, and honestly, we believe we will have the evidence to get through summary judgment and move towards a trial on that issue.

THE COURT: This isn't before me today, but how would you get your fraud count into a class?

How would you certify on the fraud count, individual issues there?

MR. MAGINNIS: Good question. So, it depends on our offer of proof. So, to have a fraud claim you got to show misrepresentation, and that's uniform, and then you do have to show reliance and that's often not uniform. But what you do -- you can show reliance on a class-wide basis through circumstantial evidence, so what we would do is we would ask the trier of fact to say, hey, what happened to Ms. Cruz, what happened to the Martins, they read this letter just like everybody else in the class would. They understood it just like everybody else in the class would. They relied on its true veracity just like everyone in the class would, and you are entitled to find that on a class-wide basis the class

relied on the letter to their detriment.

THE COURT: So you can do it.

All right. That's not really before me.

MR. MAGINNIS: Okay.

THE COURT: All right. I think that was -- I think that's all the questions I had.

Let me bounce it back for rebuttal, if you have any.

MS. ACCARDI: Just very briefly, Your Honor. I think with regards -- the first kind of argument that Mr. Maginnis started with with regards to just kind of -- whether the language in the notice is fair or not, I think he continues to go back to on day 36, you know, the day immediately after the payment due date, we were not, pursuant to federal law or pursuant to Selene's practices, as it's plead in the complaint, we do not accelerate loans on that day.

I think, again, we're reading into the notices provisions this immediacy that is not there. A, there is no indication as to when we are going to take any action, and certainly not a deadline or prescribed of, you know, we will accelerate it on this day. That's not there.

I think that is the ultimate crux there, Your Honor, is that we are -- and pursuant to the terms of the mortgage and federal law, able to accelerate loans pursuant to the loan terms. It's just the notices of default -- we are reading into it that this is an immediacy argument, so I think that's the

key distinction, Your Honor.

I will go back to the Chalik case. I think that we talked about with regards to separate behavior for subsection F, and in that case, Your Honor, the Court held that the plaintiffs' 1692f claim is indistinguishable from their 1692e claim, and the law is well settled that one cannot rescue a defective 1692e claim through Section 1692f's catchall provision. So, therefore, they dismissed the 1692f provision.

THE COURT: Which one is that? Is that the M case?

MS. ACCARDI: I'm sorry, the Chalik 677 F.Supp 2d at 1322.

THE COURT: Yeah, I remember that.

MS. ACCARDI: Finally, Your Honor, I think going back to the negligent misrepresentation claim really quickly, Your Honor, I think I had previously mentioned this, but I wanted to mention it if I did not. The Barilla case that's been mentioned a few times held that the plaintiffs alleged that they were injured by satisfying their contractual obligations, and the Court is aware of no case law to support the contractually owed payments are actionable losses.

And, again, injury is an element of negligent misrepresentation, so if you have not alleged an injury, in fact, you are going to fail on that claim, which is the case here, Your Honor.

THE COURT: Where are we on this case procedurally?

It's not my case, obviously, but this motion has been pending for a while. You guys have a class motion also pending?

Is discovery stayed or is discovery going on?

MS. ACCARDI: Ongoing, Your Honor.

THE COURT: Okay.

MR. MAGINNIS: And almost complete, yeah.

MS. ACCARDI: Excuse me, it's complete.

MR. MAGINNIS: Well, you may recall, Judge, we were before you on the net worth issue where there was discovery relating to that and potentially reopening a 30(b)(6), and that, for the most part, is the last bit of discovery remaining in the case.

THE COURT: I don't mean to hurt your feelings, but I don't recall that.

MR. MAGINNIS: It wasn't a captivating argument? I'm surprised.

MS. ACCARDI: We are not very memorable. That's okay.

THE COURT: Tell me about your motion to strike the jury demand.

MS. ACCARDI: Sure, Your Honor, let me pull out my outline on that one.

I will try to be brief on this too, as much as I can, since I know we are running out of time.

Both mortgages, as Your Honor is aware, have a jury trial waiver provision in them. The Martins, the plaintiffs

signed directly under the waiver provision, and then Ms. Cruz, the other named plaintiff, initialed on the page that contains the jury trial waiver.

Both loans at issue are owned by the same investor and both are, obviously, serviced by Selene, as the loan servicer and attorney, in fact, for the owner. And we have submitted to the Court, attached to our motion to strike and then our reply, powers of attorney evidencing that agency relationship.

THE COURT: Let me ask you this; do you believe your client gets the benefit of the jury trial waiver by the mere fact of the agency relationship, or is there something specific in this power of attorney that I should focus on that really -- is there some magic language in the power of attorney or is it the mere agency relationship itself?

MS. ACCARDI: I think -- I mean, the powers of attorney does set forth what powers like Selene has pursuant to their power of attorney. There is some, I guess, if you want to call it magic language in the power of attorney that states that Selene -- excuse me, that U.S. Bank is empowering Selene with the authority to enforce the terms of the security instrument. So I would think, honestly, just pursuant to that, Your Honor, that if we are empowered with the ability to enforce the terms of the security instrument on behalf of U.S. Bank we can enforce the terms of the jury waiver provision.

THE COURT: Where is that?

I looked for language like that. All I see is that they have the power to execute and acknowledge in writing documents customarily used to do the following ten things, and then it gives a list of ten things. But technically, all this document does is give your client power to sign documents on behalf of the principal, I believe, unless you tell me differently.

MS. ACCARDI: Yeah, I think it sets forth a host of obligations, Your Honor. I think -- I mean, like, the first paragraph we can demand, sue, recover for fees and things. Basically, really, I mean, it is a pretty exhaustive list and I don't have highlighted in here, you know, I should have, where I took that language from, Your Honor. But it really empowers Selene to act in U.S. Bank's interest and act in their place as their agent, as you would imagine any agency principal, is any action that U.S. Bank could take on behalf of enforcing the security interest, they are providing that to Selene to act in their stead is really what it is.

I will look through here, Your Honor, and I will -- after this, if I can, I can highlight it and send it to Your Honor. I don't think I would have taken it -- I have it in quotes in my notes, so I think I must have pulled it -- I just can't find it at the very present moment.

THE COURT: I'm fine if you find it before the end of the hearing. If you don't, within 24 hours just do a

supplement on what page and where it says that.

Do you have any other argument?

MS. ACCARDI: Oh, yes, I do.

So, I think going to -- there is a couple of things here, Your Honor. First would be courts that have upheld the validity of an identical jury trial waiver provision like this.

The Acciard case out of the Middle District noted that an identical provision was identified as a bold-faced heading, set forth a separately numbered paragraph contained in the loan, in the mortgage, excuse me.

Same thing in the Murphy court, Your Honor, out of the Middle District found an identical jury trial waiver provision to be enforceable. So I think just the fact that the jury trial waiver was entered into knowingly and conspicuously would say that it is valid in that respect.

With regards to whether the claims alleged here relate to the mortgage sufficiently to kind of call that jury trial waiver into issue, the Middle District in the Levinson case held that the defendant's alleged behavior in violation of the FCCPA was due to the plaintiffs' failure to pay as contractually obligated under the mortgage, and found that the waiver applied to actions arising out of debt collection activity because it was foreseeable when the parties executed the mortgage that the defendant would engage in debt collection practices. Therefore, at least in the Levinson case there,

Your Honor, they found the jury waiver provision to apply to FCCPA claims.

There is a host of other case law out of Florida that follows suit. The Newton case out of the Middle District held that a TCPA case fell within the jury trial waiver provision. The Foley case out of the Southern District particularly, Your Honor, held that, "While plaintiffs' claim for violation of TILA likely does not arise out of the loan documents, the Court concludes that the in-any-way-related-to provision of the jury trial waiver does encompass the instant action."

Then on the Martorella case, also out of the Southern District, Your Honor, held that the plaintiffs' FCCPA claim arrive from collection activity from amounts due under the mortgage and the note that she executed and, therefore, were applicable to her FCCPA claim.

And we cited a bunch of other cases, Your Honor, out of Florida that hold that FDCPA and FCCPA claims do relate sufficiently to the terms of the mortgage to allow the jury trial waiver provision to come into play.

THE COURT: Okay.

MS. ACCARDI: Then -- I think we can turn to the standing issue, Your Honor, which I think is what you had already basically touched on.

The case law on this one, I will say, is important to know the details I think is the big thing.

So, the first case I'll mention is the Hamilton case out of the Southern District. In that case, Your Honor, the Court held that an exception to the rule exists for agents of a party to a contract where a principal has signed a contract containing a jury waiver clause, its agents may also enforce the waiver with regard to claims arising from acts taken within the scope of their agency.

Again, the Charles case also out of the Southern District, Your Honor, affirms that point, and they said that here, like in Hamilton, the plaintiff alleges that SPS was hired to service the loan and that SPS is an agent of the loan owner.

I will note here, Your Honor, that same allegation is included in our complaint that Selene services both of these plaintiffs' loans. So at a minimum, even with that allegation, taking the allegations of the complaint as true, that Selene is the servicer of these loans.

And the Court in Charles also mentions, basically kind of like a circumstantial evidence of the servicing relationship would be the actions that SPS took that were alleged in the complaint, they are loan servicing actions. Similar loan servicing action are alleged in our complaint, the fact that Selene accepts payments. We sent the default notices on behalf of the owner of the loan to collect the debt.

The same thing, all of this evidence is this agency

relationship, even apart from the powers of attorney that we have submitted to the Court, which is, obviously, direct evidence of the agency relationship.

Then, finally, the Costello case also out of the Southern District, Your Honor, relied on Hamilton, relied on Charles that I just mentioned, and indicated that in carrying out its obligation to service the loan consistent with the terms of the mortgage, defendant effectively acquired the rights and obligations of the lender. Indeed, the mortgage contract, itself, contemplates the direct involvement of the loan servicer. Accordingly, I find that the defendant as an agent of the lender is entitled to avail -- in this situation it's a presuit notice requirement, but basically entitled to avail itself to enforce the terms of the mortgage.

So, all of those cases out of the Southern District, Your Honor, stand for the proposition an agent of the loan holder can enforce the terms of the mortgage, including the jury trial waiver, and I will leave it that.

THE COURT: All right. Mr. Maginnis.

MR. MAGINNIS: So, it's a mixed bag of case law, Judge. We think our cases are more recent and more detailed, and we think that's for a reason. The cases -- there is even cases where the courts find in favor of the plaintiffs where the Court says, well, I asked the defendant how you might be an assignee or you might be an agent, they couldn't come up with

any evidence to support it so I'm going to deny it.

I think there is in some instances a fundamental misunderstanding of what loan servicers do. The Costello case that counsel just mentioned is an example. The Court right there in carrying out its obligation of servicing the law, they effectively acquired the rights and obligations of the lender. That is not right.

Lenders -- a lender lends, makes a loan. It is a generally securitized and sent in a package to, and purchased by a successor in interest asset, who is a single purpose asset who only owns portfolios of loans, which then assigns the owner a right to a bank like U.S. Bank.

So, in this case --

THE COURT: I'm sorry.

MR. MAGINNIS: -- there is an original lender, there is a successor in interest, which is a trust, and then there is an assignee of an owner, which is U.S. Bank. And Selene is just a contracted party to perform certain tasks. This is not subrogation, and I think courts often misunderstand that. They think that they basically are unified and are the same as servicer and owner. They are not. That's why they need a power of attorney to do anything.

The Hamilton case which they mentioned is doctors working for a hospital. That's not the same thing as this.

So, the mortgage doesn't give them any of this. The

mortgage talks about lenders, assignees, successor in interest, and in some cases sounds like that gets it done. It doesn't sound like Selene is arguing that. They even admitted in their reply that they are not the lender, assignee, or successor interest.

THE COURT: Do you agree that the power of attorney makes the servicer an agent of the contracting party?

MR. MAGINNIS: Definitely not. I mean, the power of attorney -- as the Court noted, I was prepared to point out that I have no idea what they are relying upon in the power of attorney to invoke the jury trial waiver.

The power of attorney is for Selene to assist U.S. Bank, not the other way around. It's not for Selene to get the benefit of U.S. Bank. That's not what an agency relationship does. You're acting on behalf of your back. This isn't the situation where, for example, there is a quiet title case, where they are trying to eviscerate the note and the mortgage and the property interest. U.S. Bank is not involved in this. If there is a relief against Selene, nothing happens to U.S. Bank and nothing happens to U.S. Bank's mortgage.

There is nothing in the power of attorney that provides benefits to Selene to exercise U.S. Bank's rights separate and apart from the contracted job. An agency -- we always are on the other side of this, Judge. Plaintiffs -- say in a personal injury case, plaintiff says, defendant employee acting in the

course and scope they're the agent, and the defendant says, whoa, whoa, whoa, this is not -- this is far outside of the specific agency rights that they have.

If, in fact, they are an agent, agency in Florida requires specific understanding of what rights they have to act on behalf of that, and they don't have it from the mortgage, and the POA doesn't say anything about it.

So, we don't agree that they are an agent in a way that they could enforce this jury trial waiver. They may act on it happening.

THE COURT: When these servicers -- when a servicer files a foreclosure case, is it called Selene versus Homeowner or is it called Bank versus Homeowner?

MR. MAGINNIS: Well, it's actually trustee. There is a contracted party whose job it is, and I hope I'm not misstating Florida law, but in every state I've been in, the trustee is ostensibly neutral. And it's the same thing, they are hired pursuant to the mortgage documents to do a job. They do not represent -- ostensibly, they are not supposed to represent either party. They're supposed to be neutral, but what this power of attorney does, and you saw it very explicitly in that, Selene can act on behalf of U.S. Bank to make that happen.

They can hire the trustee. They can refer to foreclosure. They can assist in that participation, because they're acting on U.S. Bank's behalf explicitly and

specifically.

So, I'd say they have an agency relationship to do that, but there is nothing in that power of attorney that gives them an agency relationship to invoke a jury trial waiver for themselves that has nothing to do with U.S. Bank. And then it comes back to the issue of waiver in and of itself.

So, the language in mortgages, the case law says, that's clear and conspicuous enough to constitute a waiver, but if the Court were to find that the power of attorney creates an agency relationship somehow -- and by the way, a power of attorney that didn't get executed until after this lawsuit was filed -- how on earth could a borrower have clearly understood that they were knowingly and voluntarily waiving their jury rights, waiving their constitutional jury rights not just to the lender, which is what it says in the note, but everybody who does work on behalf of Selene.

There is no way that clause says that. So, the only way you can get to agency is through this back doorway. Then you can't find that the plaintiffs waived their rights.

THE COURT: You seem to indicate that the Court would need an evidentiary hearing or something. I mean, is that your position that we would need to put people under oath and get to ask them questions about whether they understood what this meant or are you going --

MR. MAGINNIS: Well, I think the case law as to agency

often is a question of fact.

Now, if we're now using agency for a jury trial, is that a jury question or a bench trial question, that may be a legal research thing that everybody has to look into, but ultimately, courts have found based upon purely the language that the language, in and of itself, is fine, but if you -- if the only way you can allow them to enforce that at all is through this backdoor document that the borrower could never have known about, how on earth could that be a voluntary waiver of their rights? It's not in the document.

Loan services is a defined term in the mortgage, and if they wanted to waive a jury trial for loan servicers clearly and conspicuously, all they have to do is add the defined term that's already in there. They don't do it.

Then the other piece of this is either arising out of or relating to. The case law -- the Brinegar case that we cite to relating to in this context does not mean relating to in any way possible. That would subsume any case regarding a mortgage completely, and that's why in the Shallengburg case, the Thompson case, Williams, Hamid, these are cases where it involves consumer protection claims separate and apart from the mortgage, they found that even if the mortgage servicer had the right to invoke the jury trial waiver, it didn't relate to the mortgagor arise out of.

Relate to doesn't mean in any way they connected to.

That's not the standard that the Brinegar case talks about.

So, we believe that there is a lot of reasons why a jury trial waiver doesn't apply and, again, the agency piece of this, they're basing it on a power of attorney that was filed after the case was filed that doesn't say anything about jury trials. It's hard to believe that that meets the conspicuousness standard that's required.

THE COURT: Well, she did include another one in the record, I think, that covered the time period.

MS. ACCARDI: Correct, Your Honor. The one attached to our reply is executed in May of 2023.

MR. MAGINNIS: But not one that the borrower would have ever seen or had any knowledge or had been able to rely upon.

I mean, the case law is -- I'm not saying that we win this -- that the plaintiffs have won this a hundred times out of a hundred. It's a mixed bag, but we believe the analysis -- the more deep analysis and more recent cases are in favor of plaintiff, particularly when you are talking about consumer protection cases.

And particularly when you are talking about this specific factual case, which has absolutely nothing to do with U.S. Bank, and I don't know how they could rely upon a power of attorney that invites them to act on behalf of U.S. Bank, when U.S. Bank has nothing to do with this case.

THE COURT: Okay. Rebuttal.

MS. ACCARDI: Sure, Your Honor, I think the first thing I will start with is there is a quite a few sister cases to the instant case, Your Honor, based on very similar, if not identical, default notices all filed against the lien in different jurisdictions also by Mr. Maginnis's law firm, one in the Northern District of Illinois as recently of July 18th, 2024. An order is entered on a motion to dismiss that specifically found that Selene had standing to enforce the notice and cure provision of the mortgage.

So, at least the Northern District has found that Selene, as the loan servicer, has the authority and ability to enforce mortgage terms. So that would be, I think, obviously, a point of big -- we have filed a notice of supplemental authority providing the Court with that opinion since it was issued so recently.

And then, I think going to the cases I have previously cited, Your Honor -- I can go back and see if I can find the ones -- but most of them, if not all of them, did not have power of attorneys at issue and still permitted loan servicers to enforce jury trial waivers, despite the fact of not even submitting a power of attorney, just having the circumstantial evidence of the fact that they are the loan servicer and acting on behalf of the owner of the loan.

The Costello case that I cited, while I know Mr. Maginnis probably doesn't like it, it is the law in the

Southern District, Your Honor, so it does stand for the proposition that a loan servicer can enforce jury trial waivers.

Then going to, I think, the relating to language -- I wanted to go back to very quickly -- oh, most of the, I think, authority included in the plaintiffs' response was issued after, was issued -- some of it pre the Hamilton case that came out of the Southern District, Your Honor, that I mentioned, specifically the Hamid case that was brought up, there is no discussion of agency in that.

So, most of the case law, I would say, that the plaintiffs rely on do not discuss this agency portion. They just say, you are not a party to the contract, the mortgage. You don't get to enforce mortgage terms.

It's the Hamilton cases and its prodigy that reference and bring up this agency relationship, and the fact that a loan servicer can and does enforce mortgage terms on behalf of its principal every day.

I will say, I do a fair amount of foreclosure work in Florida, and I can say that loan servicers do bring foreclosures in their own name all the time. And so it is also pursuant to these powers of attorney, there is good law in Florida saying that these power of attorneys similar to what's been presented to the Court do provide loan servicers with the authority to foreclose, to collect payments.

And I noted in this power of attorney, Your Honor, paragraph one it talks about in the beginning that it provides the authority to demand, sue, recover, and collect sums of money belonging to and claimed by the owner, trustee or the trust. They can send, obviously, notices of default, that is what's at issue in this case, and any other legal actions in tort, contract, or otherwise necessary to enforce the terms of the security instrument and to execute verifications.

So I think that's where that language is coming from, Your Honor, in that first numbered paragraph that Selene could take any other legal actions to enforce the terms of the security instrument on behalf of its principal.

THE COURT: Okay. I'm going to read that carefully.

MR. MAGINNIS: Your Honor, if I can be less than a minute on the Illinois issue.

THE COURT: Yes.

MR. MAGINNIS: Just so that -- Ms. Accardi may or may not be aware of this. We had a status conference following the issuance of that order, and we said exactly what I just told you, which is a lot of people don't understand that mortgage servicers and lenders are not the same thing. They're two different paths and to be (indiscernible) to amend the complaint.

So, obviously, we didn't do a good job of explaining that, but that order since it's been vacated, we are amending

the complaint. So, you know, if we did a poor job of explaining that in that complaint, hopefully we did a better job today, but that Costello case is an example of misunderstanding the roles.

Loan servicers do work for owners. They are not lenders.

THE COURT: Okay. All right.

Listen, thank you for the good briefing and the good arguments. This motion has been pending for a while, so I am trying to get it out as soon as I possibly can, and I will get you something hopefully quickly.

Do you have anything else from either side?

MR. MAGINNIS: Nothing from the plaintiff, Judge.

MS. ACCARDI: No, Your Honor.

THE COURT: All right. Enjoy the rest of the week everybody.

MS. ACCARDI: Thank you, you as well.

MR. MAGINNIS: Thank you.

THE COURT: Thank you all.

MR. HARRIS: Thank you, Your Honor.

(Proceedings were concluded.)

C E R T I F I C A T E

I, Patricia Diaz, Registered Professional Reporter, in and for the United States District Court for the Southern District of Florida, do hereby certify that I transcribed from digital audio recording the proceedings had the 14th day of August, 2024, in the above-mentioned court; and that the foregoing transcript is a correct and complete transcript of said digital audio recording.

September 2, 2024
DATE

/s/Patricia Diaz
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